Chong Mee Hup Kee Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor

HIGH COURT (IPOH) — JUDICIAL REVIEW NO 25–20 OF 2005
VT SINGHAM J
18 JULY 2008

Administrative Law — Judicial review — Certiorari — Application to set aside award made by chairman of Industrial Court — Whether award made was justified

Labour Law — Employment — Dismissal — Constructive dismissal — Dismissal without just cause or excuse — Finding of constructive dismissal — Whether there ought to be a 50% adjustment on award

Labour Law — Employment — Dismissal — Damages — Whether a short break in employment could be taken into account — Whether reimbursement for food allowance, petrol and medical fees justified — Award in lieu of reinstatement at discretion of court — Whether award made was justified

The applicant/company had applied for an order of certiorari to set aside or quash the award made by the chairman of the Industrial Court in favour of the second respondent/employee. The employee commenced employment in November 1987. The employee left the employment on 1 November 1995 and rejoined on 16 November 1995. The employee, by a letter dated 23 May 2001 was initially dismissed with immediate effect as production manager without the company assigning any reason. Following a complaint to the Industrial Relations Department, the employee was reinstated by consent through a memorandum of agreement dated 30 June 2001 signed by the company and the employee. On 22 August 2001, the employee regarded himself as being constructively dismissed as a result of unbearable and unpleasant events that happened. The employee contended that it amounted to breach of the implied obligation of mutual trust and confidence which drove him out of the employment and destroyed the foundation of the contract. The employee had also claimed that he was dismissed without just cause and excuse. There were basically three principle assertion for consideration: (i) whether there was constructive dismissal; (ii) whether the break in the employment between 1 November 1995 till 15 November 1995 should be taken into account in awarding the compensation in lieu of

reinstatement and if the compensation was excessive; (iii) whether the employee was entitled to be awarded the sum of RM513.40 as reimbursement for food allowance, petrol and medical fees.

Held, dismissing the application with costs:

(1) The acts and conduct of the company which were carried out over a continuous period of about two months since the employee was reinstated on 2 July 2001 was tainted with malice and done in such undue, undignified and degrading fashion against the employee that his reputation and dignity had been severely diminished and jeopardised to such an extent that the employee had no other choice but to have considered himself and constitute the conduct and treatment of the company as constructive dismissal without just cause or excuse as the mutual trust and confidence was not geminating at all (see para 11); *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92; *Lewis v Motorworld Garages Ltd* [1985] IRLR 465; *Bayer (M) Sdn Bhd v Anwar bin Abdul Rahim* [1994] ILR 473; *Wood v WM Car Services* [1981] ILR 666 and *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761 referred.

(2) By the memorandum of agreement dated 30 June 2001, it was expressly stated and mutually agreed that the company would re-employ the employee on his original position without any loss of seniority together with benefits which he had enjoyed and there was no new terms of employment. Further, the company had also agreed to pay arrears of wages from 24 May 2001 till 1 July 2001. All these concession and mutual agreement when taken cumulatively together with the findings of the learned chairman for having awarded the compensation for 13 years and 8 months, this court found that it did not exceed jurisdiction (see para 15).

(3) The court found that the award for compensation in lieu of reinstatement by the learned chairman was not manifestly excessive or unreasonable when taking into account the background facts and substantive merits of the case to justify any interference by this court although it might appear to be generous but was not unreasonable (see para 19).

(4) The finding of constructive dismissal must necessarily also led to the finding that the dismissal was without just cause or excuse for the employee to succeed in the matter before the Industrial Court as correctly found by the learned chairman. There was no justification for

a 50% adjustment on the award as submitted by learned counsel for the company which if accepted would be arbitrary and without any justification (see para 19).

(5) The award of RM513.40 being reimbursement for food allowance, petrol and medical fees was justified as the employee was entitled to receive the same during his employment. Accordingly, the learned chairman had exercised her discretion correctly in making the award and there was no justification to interfere with the award (see para 20).

[Bahasa Malaysia summary

Pemohon/syarikat telah memohon perintah certiorari untuk mengetepikan atau membatalkan award yang dibuat oleh pengerusi Mahkamah Perusahaan yang memihak kepada responden kedua/pekerja. Pekerja telah memulakan pekerjaan dalam bulan November 1987. Pekerja tersebut telah meninggalkan pekerjaan pada 1 November 1995 dan telah masuk semula pada 16 November 1995. Pekerja tersebut melalui surat bertarikh 23 Mei 2001, pada mulanya telah dipecat berkuat kuasa serta merta sebagai pengurus pengeluaran tanpa diberikan apa-apa sebab oleh syarikat. Berikutan aduan kepada Jabatan Perhubungan Perusahaan, pekerja telah dikembalikan kedudukan jawatan dengan persetujuan melalui memorandum perjanjian bertarikh 30 Jun 2001 yang ditandatangani oleh syarikat dan pekerja itu. Pada 22 Ogos 2001, pekerja itu telah menganggap dirinya dipecat secara konstruktif akibat daripada berlakunya kejadian yang tidak tertanggung dan tidak menyenangkan. Pekerja menegaskan bahawa ia membentuk pelanggaran kewajipan yang tersirat tentang kepercayaan dan keyakinan bersama yang menyebabkannya dipecat dan memusnahkan asas kontrak. Pekerja juga mendakwa yang dia telah dipecat tanpa sebab dan alasan yang adil. Terdapat tiga penegasan utama untuk dipertimbangkan: (i) sama ada terdapat pemecatan secara konstruktif; (ii) sama ada tempoh tidak bekerja antara 1 November 1995 hingga 15 November 1995 patut diambil kira dalam mengawardkan pampasan menggantikan pengembalian kedudukan jawatan dan jika pampasan itu terlalu banyak; (iii) sama ada pekerja berhak diawardkan sejumlah RM513.40 sebagai pembayaran balik untuk elaun makanan, petrol dan bayaran perubatan.

Diputuskan, menolak permohonan dengan kos:

(1) Tindakan dan perlakuan syarikat yang dijalankan sepanjang tempoh dua bulan sejak pekerja itu dikembalikan kedudukan jawatannya pada 2 Julai 2001 dicemari niat jahat dan dilakukan dengan cara yang tidak berpatutan, tidak senonoh dan menjatuhkan maruah pekerja sehinggakan reputasi dan maruahnya terjejas dan menyebabkannya

tiada pilihan lain selain menganggap dirinya dan perlakuan dan layanan syarikat sebagai pemecatan konstruktif tanpa sebab dan alasan yang adil kerana kepercayaan dan keyakinan bersama tidak wujud langsung (lihat perenggan 11); *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92; *Lewis v Motorworld Garages Ltd* [1985] IRLR 465; *Bayer (M) Sdn Bhd v Anwar bin Abdul Rahim* [1994] ILR 473; *Wood v WM Car Services* [1981] ILR 666 and *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761 dirujuk.

(2) Melalui memorandum perjanjian bertarikh 30 Jun 2001, ia dinyatakan dengan jelas dan dipersetujui bersama bahawa syarikat tersebut akan mengambil semula pekerja tersebut dalam jawatan asalnya tanpa apa-apa kehilangan kekananan bersama faedah-faedah yang telah dinikmatinya dan tiada terma baru pekerjaan. Selanjutnya, syarikat juga telah bersetuju untuk membayar tunggakan gaji daripada 24 Mei 2001 hingga 1 Julai 2001. Kesemua konsesi ini dan perjanjian bersama apabila digabungkan secara kumulatif dengan penemuan pengerusi yang bijaksana yang telah mengawardkan pampasan untuk 13 tahun dan lapan bulan, mahkamah ini mendapati bahawa ia tidak melebihi bidang kuasa (lihat perenggan 15).

(3) Mahkamah mendapati bahawa award untuk pampasan menggantikan pengembalian kedudukan jawatan oleh pengerusi yang bijaksana tidak melampau atau tidak munasabah apabila mengambil kira fakta-fakta latar belakang dan merit penting kes untuk menjustifikasikan sebarang campur tangan oleh mahkamah ini meskipun ia mungkin kelihatan berlebihan tetapi adalah munasabah (lihat perenggan 19).

(4) Penemuan pemecatan konstruktif patut juga membawa kepada penemuan bahawa pemecatan itu adalah tanpa sebab atau alasan yang adil untuk pekerja berjaya dalam perkara tersebut di hadapan Mahkamah Perusahaan sepertimana yang telah didapati dengan wajarnya oleh pengerusi yang bijaksana. Tiada justifikasi untuk pelarasan 50% ke atas award tersebut seperti yang dihujahkan oleh peguam yang bijaksana bagi pihak syarikat yang mana jika diterima adalah sia-sia dan tanpa apa-apa justifikasi (lihat perenggan 19).

(5) Award RM513.40 yang merupakan pembayaran balik untuk elaun makanan, petrol dan bayaran perubatan adalah dijustifikasikan kerana pekerja berhak menerimanya semasa dia bekeja. Sewajarnya, pengerusi yang bijaksana telah menggunakan budi bicaranya dengan betul dalam membuat award dan tidak ada justifikasi untuk campur tangan dengan award tersebut (lihat perenggan 20).]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 198–208.

For cases on damages under labour law, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 898–905.

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 920–953.

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Cases referred to

Ang Beng Teik v Pan Global Textile Bhd, Penang [1996] 3 MLJ 137 (refd)
Bayer (M) Sdn Bhd v Anwar bin Abdul Rahim [1994] ILR 473 (refd)
Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)
Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)
KFC Technical Services Sdn Bhd v Industrial Court of Malaysia & Anor [1992] 1 MLJ 564 (refd)
Koperasi Serbaguna Sanya Sdn Bhd, Sabah v Dr James Alfred, Sabah & Anor [2000] 4 MLJ 87 (refd)
Lamb v Evans [1893] 1 Ch 218 (refd)
Lewis v Motorworld Garages Ltd [1985] IRLR 465 (refd)
Mak Weng Kit v Reed Exhibitions Sdn Bhd [2000] 1 MLJ 715 (refd)
National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd [2002] AMR 1387 (refd)
Pahang Lim Seong Motor Ltd & Anor v Cheong Swee Khai & Anor [1962] MLJ 29 (refd)
Puhlhofer v Hillingdon London Borough Council [1986] AC 484 (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600 (refd)
R v Northumberland Compensation Appeal Tribunal, ex p Saw [1952] 1 All ER 122 (refd)
Robinson v Crompton Parkinson Ltd [1978] IRLR 61 (refd)
United Plywood and Sawmills Ltd v Lock Ngan Loi [1970] 2 MLJ 237 (refd)
Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761; [1978] IRLR 27 (refd)
William Jacks & Company (M) Sdn Bhd v S Balasingam [1997] 3 AMR 2585 (refd)
Wong Che Ong and Koperasi Serbaguna Sanya Sdn Bhd Sabah v Dr James Alfred, Sabah & Anor [2000] 3 CLJ 758; [2001] 3 CLJ 501 (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (refd)
Wood v WM Car Services [1981] ILR 666 (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, para 1
Industrial Relations Act 1967 ss 20(3), 25, 30(6)
Rules of the High Court 1980 O 53

Chan Kok Keong (Narazali bin Nordin with him) (Chan & Associates) for the applicant.
T Selvadoray (T Selva & Co) for the second respondent.

VT Singham J:

[1] By this application for judicial review dated 17 January, 2006 (encl 9), the applicant had applied for an order of certiorari to set aside or quash the award made by the chairman of the Industrial Court, Ipoh on 20 May 2005 in favour of the second respondent/employee. In this judgment, the applicant and the second respondent would be referred to as the 'company' and the 'employee' respectively.

[2] The award of the Industrial Court in favour of the employee is as follows:

(i)	Salary for the month of August 2001	=	RM2,000.00
(ii)	Reimbursement for food allowance, petrol and medical fees	=	RM513. 40
(iii)	24 months backwages of RM2000 x 24	=	RM48,000.00
(iv)	Compensation in lieu of reinstatement being one month salary for every completed year of service (RM2000 x 164/ 12 = 13 years 8 months)	=	RM27,333.00
.	TOTAL	=	RM77,846.40

[3] The total award of RM77,846.40 was ordered to be paid through the employee's solicitors within 30 days from the date of service of this award on the company subject to any statutory deductions.

[4] Before this court proceeds to deliver its decision, it is only appropriate to list out in brief, the chronology of events which are not in dispute:

No	Date	Particulars
1	November 1987	Employee commenced employment as a laboratory assistant with the company.
2	Two years later (November 1989)	Employee was promoted to production executive
3	November 1991	Employee was promoted to post of production manager.

4	1 November 1995	Employee left the employment	A
5	16 November 1995	Employee rejoined service. Amongst the employee's duties were: (i) Promoting the marketing and sales of company's product (sauce). (ii) In charge of the production of sauce and the administration of workers employed in the production. (iii) Liaising with government department or agencies and suppliers pertaining to company's businesses.	B C
6	23 May 2001	(a) Employee was initially dismissed by a letter dated 23 May 2001 with immediate effect as production manager without assigning any reason. (b) Following a complaint to the Industrial Relations Department by the employee, he was reinstated *by consent through a memorandum of agreement* dated 30 June 2001 signed by the manager of the company Mr Yee Choon Yew and the employee. (c) *By the terms of this consent agreement, the employee was reinstated to his original post as production manager without any loss of seniority together with all benefits received.* (d) The employee was to report for work on 2 July 2001 (e) The company agreed to pay to the employee the arrears of wages for the period of unemployment from 24 May 2001 until 1 July 2001.	D E F G H I

7	22 August 2001	Employee claimed he was constructively dismissed and sent a letter to the company to that effect.

[5] On 22 August 2001, the employee regarded himself as being constructively dismissed and sent a letter dated 22 August 2001 to that effect to the company. The complaints, inter alia, of the employee for the constructive dismissed are as follows:

(i) Upon reporting for work on 2 July 2001 after the consent agreement, at about 7.45am, the employee could not locate his punch card. Upon requiring for the punch card, the manager accused him for not punching his card.

(ii) On the same day ie on 2 July 2001, the manager offered to pay three months wages if he tenders his resignation. Upon refusing to accept the offer, the management instructed him to sit outside the main office until further instructions. At about 9.17am, he was then handed the punch card.

(iii) Denied the employee access to his office in the factory where he worked prior to his first dismissal on 23 May 2001.

(iv) Denied the employee from receiving incoming calls whether it was official or private.

(v) Rejected employee's application for annual leave on 28 July 2001 and 30 July 2001.

(vi) Prevented employee from getting lifts either in the company cars or in the staff private cars either to and from work or during lunch breaks.

(vii) Made the employee to sit only outside the main office (porch) without giving any work.

(viii) Threatened to call police to arrest him if it is found that there is evidence of the employee throwing company's newspaper into the cooker during the period prior to the first dismissal on 23 May 2001.

(ix) The place where the employee was made to sit outside the main office (porch) were bad infected with mosquitoes due to the presence of used tyres, used wooden panels, doors, old spare parts for lorries, dustbins and newspapers.

(x) Ordered not to enter the factory areas nor be seen talking to any staff in the factory.

(xi) The personal driver of human resources manager was directed to guard the employee.

(xii) Rattan chair was replaced with plastic chair on 6 July 2001. Later table and chair were removed and given stool without backrest to sit.

(xiii) The employee suffered backaches due to long hours of sitting on the stool and had to be on medical leave for two days.

(xiv) The employee who sat outside the main office (porch) was doing nothing and in full view of his colleagues, visitors and company suppliers which caused much embarrassment as he was still the production manager.

(xv) The employee was required to wait at the guard house each day until the arrival of the top management before he was allowed to go to the office.

(xvi) The employer assured the employee that a company car will be given to him before 7 July 2001. However, on 21 August 2001, on the pretext of giving a car to the employee, the employer made available to him an old diesel car which needed repair and a shell petrol card instead of a diesel card was given.

(xvii) The employee was accused of misappropriating the insurance premium payable to Fomema Sdn Bhd and a police report was lodged against the employee despite the insistence by the employee that he did not misappropriate the said premium. Later, police investigation revealed there was no case against the employee as another staff of Fomema Sdn Bhd had already admitted to misappropriating the said premium.

(xviii) The employee was told that his office will be renovated and will be used by the managing director and that a place will be allocated to him after the renovation. Later, vide a letter dated 21 August 2001, the employee was informed the renovation will be delayed and he could now occupy his office. When the employee came to his office on 22 August 2001, he found that the air conditioner which was relatively new and was working well previously was now not functioning. Upon enquiry, he was told that certain parts of the air conditioner were purposely removed a few days ago.

(xix) All these events caused anxiety, pressure and distress to the employee.

[6] As a result of the unbearable and unpleasant events as stated above, the employee had contended that it amounted to breach of the implied obligation of mutual trust and confidence which drove him out of the employment and destroyed the foundation of the contract. Hence, a

repudiatory breach had occurred which went to the root of the contract and which showed the employer had no longer intended to be bound by its contract and the employee was unable to tolerate the oppression and victimisation which led to the employee walking out of the company on 22 August 2001 and treating himself as constructively dismissed. The employee had also claimed that he was dismissed without just cause and excuse. He further contended that he had at all times discharged his duties diligently and had done so much to promote the business of the company.

[7] As a result of the complaints above, he claimed that he has suffered loss and damage and there was unfair labour practice. Consequently, he had applied to the Industrial Court to reinstate him to his former position as the production manager without any loss of wages, allowances, service seniority, privileges or benefits of any kind or in the alternative, that he had been constructively dismissed. The matter was referred to the Industrial Court by the Minister of Human Resources. However, the company had denied all the complaints of the employee and contested the claim at the Industrial Court on the ground that the employee left the employment voluntarily.

[8] Section 20(3) of the Industrial Relations Act 1967 states:

> (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

Pursuant to the reference under s 20(3) of the Industrial Relations Act 1967 to the Industrial Court, the Chairman, Puan Choong Siew Khim of the Industrial Court, Ipoh on 20 May 2005 found that the employee had proved his claim of constructive dismissal and it was without just cause or excuse. However, she found that reinstatement was not the proper remedy. Instead, she awarded compensation in the sum of RM27,333 in lieu of reinstatement, backwages for 24 months based on his last drawn salary of RM2,000 per month, amounting to RM48,000, RM513.40 as food allowances, petrol and medical fees for the month of August 2001.

[9] On 9 January 2006, on the application of the company to stay the payment of the award to the employee as ordered by the Industrial Court, this court had ordered the award being the sum of RM77,846.40 to be paid into a fixed deposit account in the name of both solicitors, namely Messrs Chan & Associates for the company and Messrs T Selva & Co for the employee until the disposal of this judicial review application (see s 25 read together with para 1 of the Schedule of the Courts of Judicature Act 1964 and O 53 of the Rules of High Court 1980).

DECISION

[10] In this application, there are basically three principle assertion for consideration: first, whether there was constructive dismissal; secondly, whether the break in the employment between 1 November 1995 till 15 November 1995 should be taken into account in awarding the compensation in lieu of reinstatement and if the compensation was excessive; thirdly, whether the employee was entitled to be awarded the sum of RM513.40 as reimbursement for food allowance, petrol and medical fees.

CONSTRUCTIVE DISMISSAL

[11] The question whether there was a constructive dismissal as complained by the employee is one that must eminently be determined in the light of its own particular set of facts and there cannot be a definite or inflexible interpretation of law. On the facts and by its very nature in which the employee was treated and the conduct of the company towards the employee is so devastating, the consequent upon the employee was that its effect were so intolerable and unacceptable that it smacks of unjust and a calculated and deliberate attempt to exert undue and unreasonable pressure on the employee to leave the employment. Accordingly, that conduct would amount to constructive dismissal as correctly found by the learned chairman of the Industrial Court. The learned chairman had correctly directed her mind to the points of law that governs the case before her based on the materials placed before the court. By no stretch of the imagination could the conduct and treatment towards the employee as per the complaints could be considered as not justifying constructive dismissal or is committed outside the ambit of constructive dismissal. The acts and conduct of the company which were carried out over a continuous period of about two months since the employee was reinstated on 2 July 2001 was tainted with malice and done in such undue, undignified and degrading fashion against the employee that his reputation and dignity have been severely diminished and jeopardise to such an extent that the employee had no other choice but to have considered himself and constitute the conduct and treatment of the company as constructive dismissal without just cause or excuse as the mutual trust and confidence was not geminating at all (see *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 (SC); *Lewis v Motorworld Garages Ltd* [1985] IRLR 465; *Bayer (M) Sdn Bhd v Anwar bin Abdul Rahim* [1994] ILR 473 at p 477; *Wood v WM Car Services* [1981] ILR 666; *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761).

[12] This court is of the considered view that the treatment accorded towards the employee after the company had by consent agreed to reinstate him to his original position on 2 July 2001 without any loss of benefit or

seniority was so downgrading of his position and deplorable that it cannot be anything but its effect judged reasonably and objectively must necessarily be constructive dismissal as no employee can be expected to put up or tolerate with it any longer. In fact it is an attitude inherent and a wrongful act without just cause and excuse. An employer is considered to act in bad faith if he acts dishonestly, in order to achieve his desired object other than that for which it believes the power has been given or acts maliciously, if it is out of personal animosity.

[13] Abuses by employers by unauthorised devise circumventing the armour of terminating an employee seem to be common phenomena by some employers to get rid of the employee by way of intimidation, harsh treatment or coercive process. Consequently, in the instant case, the employee found it as humiliating, distressful and damaging to his reputation caused by the said manner of treatment towards him. Accordingly, the employee under the circumstances asserted his right to treat himself as having been discharged or dismissed without just cause or excuse as the company had conducted themselves in a manner calculated to destroy seriously and damage the relationship of confidence and trust between the company and employee (see *Lamb v Evans* [1893] 1 Ch 218 at p 229; *Robinson v Crompton Parkinson Ltd* [1978] IRLR 61; *Wood v WM Car Services* [1981] ILR 666; *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137).

AWARD OF COMPENSATION

[14] As for the complaint of the applicant that the learned chairman had erred in not taking into account the break in the employment from 1 November 1995 till 15 November 1995 (two weeks), this court is of the considered view that, that submission is not correctly reflected when considering the facts and the findings of the learned chairman. The learned chairman having considered that the employee had left the employment on 1 November 1995 and rejoined on 16 November 1995 had expressly stated that she was not taking this lapse into account due to its brevity and awarded compensation for the period of 13 years and 8 months ie from the date the employee was employed in November 1987 till the time of the constructive dismissal. There was no sufficient evidence produced by the company that the employee was receiving income as alleged and the exact amount after his dismissal. Therefore, it is not correct to say that the learned chairman had failed to take into account the break in the employment from 1 November 1995 till 15 November 1995 and this court finds that she had assessed the compensation on the materials placed before the court.

[15] By the memorandum of agreement dated 30 June 2001, which was signed at the Industrial Relations Department by both the chairman of the

company and the employee, it is expressly stated and mutually agreed that the company would *reemploy the employee on his original position without any loss of seniority together with benefits which he had enjoyed* and there was no new terms of employment. Further, the company had also agreed to pay arrears of wages from 24 May 2001 till 1 July 2001. All these concession and mutual agreement when taken cumulatively together with the findings of the learned chairman for having awarded the compensation for 13 years and 8 months, this court finds that it did not exceed jurisdiction. Accordingly, the learned chairman took into consideration the employee's employment for the period of 13 years and 8 months for the purpose of computing the compensation and objectively was justified and was explained. The learned chairman therefore, had not erred in law or in fact or made any reviewable error or had acted in excess of or without jurisdiction or had failed to take into account the lapse notwithstanding the letter dated 12 July 2002 from the employer when she made the award (see *Koperasi Serbaguna Sanya Sdn Bhd, Sabah v Dr James Alfred, Sabah & Anor* [2000] 4 MLJ 87).

[16] The assessment of the monetary award as compensation in lieu of reinstatement is a matter for the discretion of the Industrial Court which was exercised reasonably and granted in accordance with equity and good conscience based on the particular set of facts, the background facts, circumstances and substantive merits of the case. Unless the learned chairman had acted in excess or without jurisdiction in exercising that discretion, this court in this judicial review application should not disturb that award. It is important to state at this stage that it is settled law that it is not the function of this court to act as an appellate court or as a cloak of an appeal in disguise when hearing application for judicial review (see *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417; *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137; *KFC Technical Services Sdn Bhd v Industrial Court of Malaysia & Anor* [1992] 1 MLJ 564; *William Jacks & Company (M) Sdn Bhd v S Balasingam* [1997] 3 AMR 2585 at p 2590 and followed in *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd* [2002] AMR 1387; *Mak Weng Kit v Reed Exhibitions Sdn Bhd* [2000] 1 MLJ 715; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; *R v Northumberland Compensation Appeal Tribunal, ex p Saw* [1952] 1 All ER 122 at p 133).

[17] The assessment of monetary award or compensation in lieu of reinstatement is a matter of discretion for the Industrial Court which no doubt has to be exercised reasonably in light of the particular facts, circumstances, substantial merits of the case and of course, in accordance

with equity, substantive merits and good conscience without regard to technicalities and procedure (see s 30(6) of the Industrial Relations Act 1967).

[18] On the facts in the instant case, the learned chairman had exercised her discretion correctly and there is no justification to interfere with its discretion. Nevertheless, this does not mean that this court is helpless to interfere with the discretion exercised by the learned chairman of the Industrial Court. The power of this court to interfere will arise whenever justice so required but this is not one of those cases which required this court to interfere with or vary the award of compensation as the learned chairman did not transgress the principle of the rule of law (see *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at p 518)

[19] This court finds that the award for compensation in lieu of reinstatement by the learned chairman is not manifestly excessive or unreasonable when taking into account the background facts and substantive merits of the case to justify any interference by this court although it may appear to be generous but is not unreasonable. The learned chairman had correctly found the employee had been constructively dismissed and the dismissal was without just cause or excuse upon considering all the issues most carefully and thoroughly and she did not exceed statutory powers (see *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27 followed in *Wong Che Ong* and *Koperasi Serbaguna Sanya Sdn Bhd Sabah v Dr James Alfred, Sabah & Anor* [2000] 3 CLJ 758 (CA); [2001] 3 CLJ 501 (FC), *United Plywood and Sawmills Ltd v Lock Ngan Loi* [1970] 2 MLJ 237; *Pahang Lim Seong Motor Ltd & Anor v Cheong Swee Khai & Anor* [1962] MLJ 29; *KFC Technical Services Sdn Bhd v Industrial Court of Malaysia & Anor* [1992] 1 MLJ 564). In fact, both the findings are so interwoven that the finding of constructive dismissal must necessarily also lead to the finding that the dismissal was without just cause or excuse for the employee to succeed in the matter before the Industrial Court as correctly found by the learned chairman. There is no justification for a 50% adjustment on the award as submitted by learned counsel for the company which if accepted would be arbitrary and without any justification.

[20] As for the award of RM513.40 being reimbursement for food allowance, petrol and medical fees, this court is of the considered view that the award was justified as the employee was entitled to receive the same during his employment. Accordingly, the learned chairman had exercised her discretion correctly in making the award and there is no justification to interfere with the award.

[21] Having gone through the notes of evidence, together with the relevant documents and findings made by the learned chairman of the Industrial Court and considering the written submissions of both parties and the authorities, this court is satisfied that there is no error or illegality or irrationality or any procedural impropriety on the findings made by the learned chairman of the Industrial Court.

[22] This court wishes to observe that in order to be considered as a caring employer, the organisation must recognise and in addition to giving monetary benefit, the skills, experience and efforts of the employee and value its employees as one of the most important resources which undoubtedly is a contributing factor to the success of the business in most of the companies and not to treat the employees in an uncivilised manner or discourteous behaviour.

[23] On the totality of the evidence and upon reviewing the manner in which the learned chairman of the Industrial Court had made her decision, this court is unable to find any reviewable error or jurisdictional error or any material facts which had been missed or disregarded or misdirection or misapplication of the law to the facts to justify an interference by this court. Accordingly, the application for judicial review is dismissed with costs.

Application dismissed with costs.

Reported by Sally Kee